

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

GEMINI ALUMINUM CORPORATION,

Respondent.

LESTER L. YOUNG,

Complainant.

Case No.

E97-98 L-0019-00-e

C98-99-007

02-09-P

DECISION

Hearing Officer Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on January 9 and 10, 2001, and February 5 and 6, 2001, in Los Angeles, California. Bert Bresticker, Staff Counsel, represented the Department of Fair Employment and Housing. Peter L. Tripodes, Esq., represented respondent Gemini Aluminum Corporation. Both complainant Lester L. Young and respondent's president Allan Hardy attended the hearing.

The Commission received the hearing transcript on February 26, 2001. The parties timely filed their closing briefs and the case was submitted for decision on May 8, 2001. Hearing Officer Hunt issued a proposed decision on July 10, 2001.

On September 10, 2001, the Commission decided not to adopt the proposed decision and notified the parties of the opportunity to file further argument by October 9, 2001. The parties timely filed their further arguments.

After consideration of the entire record and arguments, the Commission makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On July 9, 1997, Lester L. Young (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) against Gemini Aluminum Corporation. The complaint alleged that Gemini Aluminum Corporation discriminated against complainant on the basis of his religion, Jehovah's Witnesses, by suspending him for attending a Jehovah's Witnesses' religious convention, in violation of the Fair Employment and Housing Act (Act). (Gov. Code, §12900 et seq.)

2. On July 9, 1998, complainant filed an amended complaint with the Department, alleging that, in addition to the above charge, Gemini Aluminum Corporation terminated complainant for taking time off to attend his Jehovah's Witnesses' religious convention, in violation of the Act. (Gov. Code, §12900 et seq.)

3. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On July 9, 1998, Nancy C. Gutierrez, in her official capacity at that time as Director of the Department, issued an accusation against Gemini Aluminum Corporation (respondent or respondent Gemini). The accusation alleged that respondent Gemini unlawfully discriminated against complainant by failing to reasonably accommodate complainant's religion, and by failing to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivisions (a), (i) and (j).

4. On December 22, 2000, the Department filed a written request for leave to amend its accusation to allege, inter alia, a new charge of retaliation. On January 8, 2001, respondent filed a written opposition to the Department's request. After oral argument at the commencement of the hearing on January 9, 2001, the Hearing Officer granted the Department leave to amend, but also granted respondent the right to a continuance, if requested, after the Department's completion of its case in chief.

5. The Department's amended accusation alleged that respondent Gemini subjected complainant to unlawful employment discrimination by failing to reasonably accommodate complainant's religion, and by failing to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivisions (a), (i) and (j). The Department also alleged that respondent Gemini retaliated against complainant for protesting the discrimination, in violation of Government Code section 12940, subdivisions (a) and (f).

6. Respondent Gemini was, at all times relevant, a California corporation, employing about 90 employees, and was an "employer" within the meaning of Government Code section 12926, subdivision (d).

7. Respondent Gemini operated a precision aluminum extrusion plant in Pomona, California. Aluminum extrusion is a process which molds metal into shapes for various industrial purposes.

8. Allan Hardy, president of respondent Gemini, founded the business in 1979. Hardy wrote respondent's policies and procedures and managed the company on a daily basis. Hardy ran respondent's safety/management committee, which was primarily involved in overseeing safety programs and practices, but also reviewed personnel decisions and employee discipline.

9. In mid-March 1996, complainant applied for work with respondent Gemini. Complainant had over 30 years experience in the extrusion industry.

10. On March 18, 1996, Allan Hardy and his partner Frank Hogan interviewed complainant for a position as extrusion manager at respondent's Pomona plant. Hardy hired complainant, viewing him extremely well qualified. That afternoon, complainant signed a number of respondent's forms given to him by the front office clerk. These forms included respondent's absenteeism/nonpaid leave policy safety checklist, lunch break policy, "tag out/lock-out" procedures, and accident reporting rules. Complainant did not discuss any of these forms with Hardy or anyone else at respondent's company.

11. Respondent's written absenteeism/ nonpaid leave policy provides in pertinent part:

Any absences required for [non-emergency] reasons ... must be requested 72 hours in advance with written documentation. Requests such as medical surgery, court appearances, and child birth will be considered. All requests will not be considered without the written documentation in advance.

At the time of notification the supervisor will accept and submit a written request for leave along with a copy of the document to personnel. The personnel department will then make a determination and ruling as to the granting of the leave on a case by case basis.

12. Complainant started work with respondent Gemini on March 25, 1996. His job title was "extrusion manager." Respondent paid complainant a salary of \$32,380 per year (\$2,692.32 per month), before taxes and deductions.

13. Complainant's supervisor during 1996 was the then-general manager, Frank Hogan. Complainant was responsible for supervising the operations of an extrusion press, and oversaw a crew of six to eight employees. Complainant worked primarily as a foreman, one of two employed by respondent. There was also a leadman on each crew. Under Hogan's direction, complainant wrote up and signed a number of disciplinary notices for employees. Complainant

did not have direct disciplinary authority, and was not invited to attend respondent's safety/management committee meetings.

14. Respondent's plant operated three shifts "round the clock" Monday to Friday for most of the year. In the summer months, however, respondent observed a voluntary "summer power interrupt" and shut off the presses between 11:30 a.m. and 6:30 p.m. from June to September. The plant also operated on the weekends, with employees working some Saturday and occasional Sunday shifts. Employees were notified that they were required to work on the weekend by a notice posted by respondent on the preceding Thursday.

15. Complainant initially worked the day shift, but later, on a date not specified in the record, moved to the night shift, working from 6:30 p.m. to 3:00 a.m. His regular schedule was Monday to Friday, but he worked Saturdays and other additional shifts as required.

16. From the commencement of his employment in March 1996 to the end of that year, complainant worked his regular Monday-Friday schedule and, in addition, worked 17 Saturday shifts. From January to June 1997, complainant worked 11 Saturday shifts and four Sunday shifts, in addition to his regular Monday-Friday work schedule.

17. Respondent classified complainant as an "exempt employee," and did not pay him for any overtime. Complainant was paid the monthly amount of \$2,692.32, regardless of his hours or shifts.

18. Complainant had a perfect attendance record, and since starting with respondent in March 1996, had never taken any sick leave or personal time off.

19. In February or March 1997, respondent hired Jack Kaufman as a manager. Kaufman had supervisory responsibility over the extrusion press employees, including complainant. Allen Hardy trained Kaufman in respondent's personnel policies and practices.

20. Sometime in early 1997, Jackie Neag became respondent's general manager. Neag had worked for respondent for seven years, most recently as sales manager.

21. Complainant is a practicing member of the Jehovah's Witnesses faith. He was baptized into the faith in May 1970, and regularly attends a Jehovah's Witnesses' congregation. Once a year, his congregation takes part in a three-day district convention, where the teachings of the faith are discussed. The district conventions generally start on a Friday and continue over the weekend, from 9:30 a.m. to either 4:00 or 5:00 p.m. each day. Complainant first learned of the date of the 1997 district convention in the February 15, 1997, issue of "The Watchtower," a Jehovah's Witnesses' publication, and subsequent details from announcements at his congregation.

22. On June 16, 1997, complainant notified his supervisor Jack Kaufman that he needed time off on Friday June 27, and possibly Saturday June 28, 1997, if scheduled a workday, to attend his religious convention in Long Beach, California.

23. It was important to complainant's practice of his faith that he attend his annual Jehovah's Witnesses' district convention. There, he participated in Bible study and learned the teachings of his faith, including seminars on morality and other religious-based topics. The convention was comprised of worship and lessons in how to follow the Bible and be obedient to "Jehovah God." Since 1970, complainant had attended his district convention every year, except on one to three occasions when prevented by illness.

24. On June 16, 1997, Jack Kaufman memorialized complainant's request for leave in a memorandum to respondent's general manager, Jackie Neag, with a copy to Charles Spencer, a supervisor in personnel. The memorandum did not specify the reason complainant had requested the leave. Kaufman was not an experienced manager, and this was the first leave request he had handled.

25. Complainant's leave request was considered by respondent's safety/management committee, comprised at that time of Allen Hardy, his partner Frank Hogan, Jackie Neag and Kaufman. Hardy decided that Kaufman's memorandum was inadequate, and instructed Kaufman to "comply with the company policy," and get more information from complainant to support the leave request.

26. On June 25, 1997, Jack Kaufman asked complainant to sign a memorandum prepared by Kaufman, in which he stated that complainant needed the time off to attend a "religious convention with his family members." The memorandum stated that the convention dates were June 27 through 29, 1997, and that it was a three-day, once a year activity that complainant would be attending annually. The memorandum stated that hotel arrangements had already been made. The memorandum also stated, inaccurately, that the convention was to be in Inglewood, California. Finally, Kaufman wrote that "if any additional information is required please do not hesitate to contact Lester or myself." Complainant signed and dated the memorandum at the end of his shift at about 3:30 a.m. on June 26, 1997.

27. Respondent's management committee considered Jack Kaufman's memorandum concerning complainant's request for leave on June 26, 1997. After discussion, they rejected the leave request. Allen Hardy was "shocked" that complainant had requested two days leave. Hardy did not believe that complainant wanted the leave to attend a religious convention, particularly because complainant had not supplied documents supporting his request. He felt that complainant should "grow up," and that he was "playing with us."

28. After complainant reported for work on the evening of June 26, 1997, Jack Kaufman told complainant that his request for leave had been denied. Complainant told Kaufman that he was going to his convention anyway and that the arrangements and hotel reservations had all been made. Complainant worked his shift that night, finishing at 3:30 a.m. the next morning.

29. At no time did Jack Kaufman instruct complainant to submit written proof that he was attending the Jehovah's Witnesses' convention in Long Beach.

30. On June 27, 1997, complainant did not report for his work shift at 6:30 p.m. Instead, that morning, complainant drove to Long Beach, where he met his daughter, Lori Wilson, her husband Todd, and their child. Together, they attended the first day of the Jehovah's Witnesses' district convention, and that night stayed together at their hotel in Long Beach.

31. On both Saturday and Sunday, June 28 and 29, 1997, complainant attended the day-long sessions of the Jehovah's Witnesses' district convention, together with his daughter and her family.

32. Complainant reported for work on Monday June 30, 1997. At the commencement of complainant's shift, Jack Kaufman gave complainant a suspension notice, which stated that he was being issued a "warning" for being "absent 6/27 and 6/28 which was a scheduled workday." The notice also stated "Employee disciplinary action is (10) ten day suspension on Committee review." The notice stated that complainant was to return to work on July 15, 1997. Complainant signed the notice, telling Kaufman that he felt that his treatment was unfair.

33. On July 1, 1997, complainant telephoned Jack Kaufman and asked him for a copy of the memorandum in which complainant had requested time off. Complainant also advised Kaufman that complainant had an appointment with the "Labor Board" on July 9, 1997.

34. On July 2, 1997, Kaufman memorialized his July 1, 1997, telephone call with complainant, and forwarded the memorandum to Jackie Neag, with a copy to Charles Spencer. Respondent never provided complainant with a copy of the memorandum he asked for in his telephone call on July 1, 1997.

35. On July 3, 1997, Jack Kaufman prepared a memorandum to Jackie Neag about his June 30 interaction with complainant, when complainant was suspended. In his memorandum, Kaufman noted that complainant had stated that he "had to do what was important to him, and that he would have to do the same thing next year if necessary due to his convictions." Kaufman also noted that complainant did not act "upset," and "cordially left the plant," saying he would see Kaufman after his suspension was over.

36. On July 9, 1997, complainant had an appointment at the Department of Fair Employment and Housing, where he filed the initial complaint underlying this action against respondent for religious discrimination.

37. Respondent's safety/management committee met at least twice in early July to discuss complainant's status. At the committee meetings, Allan Hardy and Jackie Neag reviewed Jack Kaufman's memoranda of July 2 and 3, 1997. Kaufman pointed out the complainant had an appointment at the "Labor Board" on July 9, 1997.

38. Respondent relied exclusively on Jack Kaufman for information about complainant's leave request. Respondent never invited complainant to address the committee, and neither Hardy nor Neag ever spoke directly to complainant about his need or reasons for leave. Ultimately, prior to the expiration of complainant's suspension, Hardy and Neag decided to terminate complainant.

39. Respondent terminated complainant's employment in a letter signed by Jackie Neag at the direction of Allen Hardy, and sent to complainant by certified mail on July 11, 1997. In her letter, Neag described complainant's leave request as leave to attend a "religious retreat," and stated: "The company could not accommodate a non-emergency leave." In the termination letter, Neag also wrote, "Your comment was that you were aware these actions would subject [sic] to some discipline; however you would once again take unauthorized time off to do those activities that are important to you." Neag's letter also stated that "at no time was any documentation presented to substantiate your absence and whereabouts as per company policy." Finally, Neag wrote, "Your actions constitute blatant insubordination and complete disregard for company rules and procedure."

40. Respondent observed "mainstream" religious holidays for employees, such as Christmas, and in addition, allowed time off for christenings and baptisms, as long as employees provided written documentation such as a card from their church or pastor. Respondent had never before received a request for religious leave from a member of the Jehovah's Witnesses faith.

41. While it was respondent's policy that disciplinary suspensions were unpaid, through an oversight with respondent's payroll service, complainant was paid for his suspension period through July 19, 1997.

42. On July 15, 1997, complainant started a new job with Eden Enterprises, earning slightly higher pay than he had earned with respondent.

43. Respondent did not have a company policy on discrimination based on religion nor any complaint process for employees alleging discrimination based on religion or seeking reasonable accommodation for their religious creed.

DETERMINATION OF ISSUES

Liability

The Department's accusation, as amended at hearing, alleges that respondent discriminated against complainant by refusing to accommodate his religious beliefs in violation of Government Code section 12940, subdivisions (a) and (j), and failed to prevent

discrimination in violation of Government Code section 12940, subdivision (i). The Department also alleged that respondent Gemini retaliated against complainant for protesting the discrimination, in violation of Government Code section 12940, subdivisions (a) and (f).³

A. Religious Creed Discrimination

The Act prohibits an employer from discriminating on the basis of religious creed. (Gov. Code §12940, subds. (a) and (l) [former subd. (j)].) The term “religious creed” includes “any traditionally recognized religion as well as beliefs, observances or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.” (Cal. Code of Regs., tit. 2, §7293.1.) The Act imposes both a duty to refrain from overt discrimination and a duty to provide reasonable accommodation. (Gov. Code §12940, subds. (a) and (l); Cal. Code of Regs., tit. 2, §§7293.1 and 7293.3; *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 369-70 (review den. March 12, 1997); *Dept. Fair Empl & Hous. v. Centennial Bank* (1987) No. 87-03, FEHC Precedential Decs. 1986-87, CEB 6, p. 12; *Dept. Fair Empl. & Hous. v. District Lodge 120, Internat. Assn. of Machinists & Aerospace Workers* (1981) No. 81-07, FEHC Precedential Decs. 1980-81, CEB 23, pp. 7-10; *Dept. Fair Empl. & Hous. v. Union School Dist.* (1980) No. 80-32, FEHC Precedential Decs. 1980-81, CEB 17, pp. 5-6.)

Failure to Accommodate

To establish that respondent Gemini failed to accommodate complainant’s religious needs, the Department must prove by a preponderance of evidence that complainant had a bona fide need for accommodation of his religious beliefs or observance that conflicts with an employment requirement; that respondent was aware of this need for accommodation; that respondent did not accommodate the belief or observance; and that respondent took adverse action against complainant for acting on his need for it. (Gov. Code §12940, subd. (l) [former subd. (j)];⁴ Cal. Code of Regs., tit. 2, §7293.1; *Soldinger v. Northwest Airlines, Inc.*, *supra*, 51

³ Government Code section 12940, subdivisions (f), (i) and (j) have been recodified and are now subdivisions (h), (k) and (l) respectively, effective January 1, 2001. This decision will hereinafter refer to the current subdivisions and indicate the former subdivision in parentheses.

⁴ The duty to accommodate is set forth at Government Code section 12940, subdivision (l), [former subdivision (j)], and provides in pertinent part that it is unlawful:

For an employer ... to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer Religious belief or observance, as used in this section,

(Continued on next page)

⁴ (Continued)

Cal.App.4th at p. 370; *Dept. Fair Empl. & Hous. v. Centennial Bank*, *supra*, FEHC Precedential Decs. 1986-87, CEB 6, pp. 12-13; *District Lodge 120*, *supra*, FEHC Precedential Decs. 1980-81, CEB 23, p. 8.)

The Department must establish a causal connection between complainant's request for accommodation and the adverse action taken by respondent. Complainant's request for accommodation need not be the sole or even dominant cause for respondent's adverse action, but need be only one of the factors that influenced respondent's decision to take the adverse action. (*Watson v. Dept. of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290; *Dept. Fair Empl. & Hous. v. Centennial Bank*, *supra*, FEHC Precedential Decs. 1986-87, CEB 6, p. 13.)

Here, the Department established that complainant's belief in, and commitment to the Jehovah's Witnesses religion was sincere and reflected in his religious observances, such as attending his congregation and the annual district conventions. Complainant credibly testified that his attendance at the convention was very important to him, as part of his Jehovah's Witnesses faith. Complainant's daughter, Lori Wilson, testified for the Department. Wilson's demeanor and forthrightness while testifying established her as a credible and convincing witness. Her testimony corroborated that of complainant that they went to the convention in Long Beach together from July 27 to 29, 1997.

Respondent argues that neither respondent's president Allan Hardy nor general manager Jackie Neag was aware that complainant was a practicing Jehovah's Witness and had no information about the religious significance of the annual convention. Respondent concedes that complainant asked for time off to attend a "religious convention" in June 1997. This request was sufficient to trigger respondent's statutory duty to initiate steps to explore reasonable accommodation for complainant's religious creed. (Gov. Code §12940, subd. (l) [former subd. (j)]; *Soldinger v. Northwest Airlines, Inc.*, *supra*, 51 Cal.App.4th at pp. 370-374; see also *Heller v. EBB Auto Co., dba Ron Tonkin Mitsubishi* (9th Cir.1993) 8 F.3d 1433, 1439 [husband's attendance at wife's conversion ceremony to Judaism protected as religious practice under Title VII], *citing Redmond v. GAF Corp.* (7th Cir. 1978) 574 F.2d 897, 900 [participation in Bible classes covered under Title VII]; *Weitkenaut v. Goodyear Tire & Rubber Co.* (D.Vt. 1974) 381 F.Supp. 1284, 1288-89 [minister's attendance at monthly church organizational meetings covered under Title VII].) Thus, complainant's attendance at his annual district Jehovah's Witnesses' convention is protected under the Act. "Religious belief or observance" under the Act expressly extends beyond the observance of a Sabbath or other religious holy days and includes, for example, reasonable travel time to and from a religious observance. (Gov. Code §12940, subd. (l) [former subd. (j)].) Moreover, complainant gave respondent sufficient information to trigger respondent's reasonable accommodation obligation when he told Kaufman that he needed leave for his religious convention. (See *Heller v. EBB Auto Co.*, *supra*, 8 F.3d at p. 1439, *citing Redmond v. GAF Corp.*, *supra*, 574 F.2d at p. 902 [informing employer that "I am not able to work on Saturday because of my religious obligation" held sufficient];

includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

Chrysler Corp. v. Mann (8th Cir. 1977) 561 F.2d 1282, 1286 [employee must, at the least, “inform...his employer of his religious needs”].)

Respondent claims that Hardy and Neag did not learn of the purpose of complainant’s leave request until Kaufman’s memorandum dated July 25, 1997. However, complainant testified that he told Kaufman on June 16, 1997, that he needed time off for his religious convention. Respondent chose not to call Kaufman as a witness, thus complainant’s testimony of what he told Kaufman is undisputed. This decision credits complainant’s testimony, and finds that respondent was advised of the protected nature of complainant’s leave request on June 16, and thus had at least two weeks in which to investigate ways to accommodate his religious needs.

Respondent next argues that there was no conflict between complainant’s religious convention and work schedule because, presumably, complainant could work his 6:30 p.m. to 3:00 a.m. shift in Pomona, then drive to Long Beach for the day-long convention sessions. Respondent, however, recognizes the inherent “practical conflict,” given complainant’s need for travel time and sleep. Further, as noted above, the Act expressly contemplates travel time as part of protected religious activity. (Gov. Code §12940, subd. (l) [former subd. (j)]).⁵

Respondent argues that complainant failed to suggest accommodation alternatives, citing the “bilateral duties” of both the employer and employee to explore reasonable accommodation. (*Soldinger v. Northwest Airlines, Inc.*, *supra*, 51 Cal.App.4th at p. 370.), Respondent however, did not initiate any steps to explore reasonable accommodation with complainant and thus, complainant’s concomitant duty did not arise. (*Id.*; *Heller v. EBB Auto Co.*, *supra* 8 F.3d at p. 1440.) Instead, respondent denied complainant’s leave request, suspending him on his return to work.

Respondent contends that complainant’s suspension was unrelated to any religious exercise or observance and was instead, based on complainant’s “blatant insubordination” in failing to comply with respondent’s attendance/non-paid leave policy, by not providing documents to substantiate his attendance at the convention. Respondent’s argument is unpersuasive.

Complainant credibly testified that Kaufman at no time asked complainant to provide documents supporting his leave request. Moreover, Kaufman did not mention asking complainant for supporting documents in any of his various memoranda to Neag. Both Hardy and Neag testified that they had no direct contact with complainant about his leave request, and that all contacts with complainant were through Kaufman. Hardy testified that he instructed Kaufman to “comply with the company policy.” Respondent however, offered no evidence that

⁵ In its brief submitted in response to the Commission’s Notice of Further Argument, respondent cites *Tiano v. Dillard* (9th Cir.1998) 139 F.3d 679, a Title VII case in which the court held that the timing of plaintiff’s decision to visit Yugoslavia was a “personal preference.” That case is inapplicable here. Complainant’s annual convention was organized by his church; the dates announced at his congregation, and his need to attend was a religious need, within the protections of Government Code section 12940, subdivision (l).

Kaufman, an inexperienced manager handling his first leave request, ever asked complainant for supporting documents.

Nevertheless, respondent contends that complainant was familiar with the attendance/nonpaid leave policy, and thus was appropriately disciplined for failing to comply with it. This argument is unpersuasive. Complainant testified that he signed the leave policy in March 1996, a week before he started work. The policy was not explained to him at that time. Moreover, respondent's leave policy is ambiguous on its face.⁶ Complainant further testified that he believed that he was complying with respondent's leave policy by asking his supervisor, two weeks before the leave dates, to "document" his request for leave in writing. Complainant's belief was not unreasonable, particularly in light of the fact that Kaufman did not ask complainant to provide other substantiating documents.

Respondent asserts as an affirmative defense to the Department's charge, a bona fide occupational qualification (BFOQ). The Commission's regulations require that, to establish a BFOQ defense, an employer must prove that it had "a practice which on its face excludes an entire group of people on a basis enumerated in the Act" and that "the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of respondent's business would otherwise be undermined." (Cal. Code of Regs., tit. 2, §7286.7, subd. (a).) The facts in this case do not support respondent's asserted BFOQ defense.

Thus, the Department established that respondent discriminated against complainant by failing to accommodate his religious beliefs, in violation of Government Code section 12940, subdivisions (a) and (l).

B. Retaliation

The Department alleges that respondent terminated complainant in retaliation for complainant's protesting discrimination and filing a complaint pursuant to the Act, in violation of Government Code section 12940, subdivision (h) [former subd. (f)]. Under this section, it is unlawful for an employer to discharge, expel, or otherwise discriminate against any person because that person has filed a complaint under the Act or opposed practices unlawful under the Act.

To establish a retaliation violation under Government Code section 12940, subdivision (h), the Department must prove by a preponderance of the evidence that complainant engaged in a protected activity, that he suffered an adverse action, and that a causal connection exists

⁶ Even Jackie Neag, who during her testimony repeatedly looked to Hardy for approval before responding to cross examination questions, testified that the policy could have been more clearly drafted.

between the protected activity and respondent's adverse action. (Gov. Code §12940, subd. (h); *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476-477.)

Here, respondent terminated complainant while he was still on suspension. As the Department points out, it is inconsistent, if indeed respondent was waiting for documents from complainant, to terminate him before his due date back at work. Respondent argues that this was to avoid confrontation in the work place; however nothing in the record indicated that complainant was likely to cause disruption – to the contrary, Kaufman's memorandum described complainant, when given his suspension notice, as "cordial" and not overly upset.

Respondent argues that respondent did not know that complainant was filing a discrimination complaint until a copy was mailed to respondent on or about July 15, 1997. Hardy testified that he was not at all concerned about complainant's "Labor Board" appointment, and that he thought it was probably a wage and hour issue. Respondent further argues that because it did not know complainant's religious belief, it was "impossible" for respondent to retaliate.

Respondent had sufficient notice that complainant's request for leave to attend his religious convention was a protected activity under the Act. Respondent also knew that complainant did not accept respondent's denial of his leave. Complainant not only attended the 1997 convention despite the denial, he also told respondent that he would do the same thing the next year. Respondent expressly seized on that fact in its termination letter, noting that complainant would "once again take unauthorized time off to do those activities that are important to you." Moreover, the evidence showed that respondent escalated its disciplinary action against complainant after he protested to his supervisor that the suspension was "unfair," and requested a copy of the memorandum requesting leave for his religious convention. Complainant also said he had made an July 9, 1997, appointment with the "Labor Board." This information was known to respondent, and considered by Hardy and Neag in deciding to terminate complainant's employment. The fact that complainant misidentified the "Labor Board" for the Department does not alter the fact that respondent terminated complainant because of his opposition to respondent's refusal to provide reasonable accommodation for his religious creed. Thus, the Department has established a causal connection between complainant's protesting respondent's unlawful conduct and his termination. Therefore, respondent violated Government Code section 12940, subdivision (h).

C. Failure to Take All Reasonable Steps Necessary To Prevent Discrimination

The Department also charges that respondent violated the Act by failing in its affirmative duty, under Government Code section 12940, subdivision (k) [former Gov. Code §12940, subd. (i)], to take all reasonable steps necessary to prevent discrimination from occurring. Respondent has an ongoing obligation, independent of any claim or proof of discrimination, to take all reasonable steps necessary to prevent discrimination. (Gov. Code, §12940, subd. (k).)

The Department established that respondent did not adequately train its supervisory and managerial personnel nor provide sufficient guidance about religious accommodation. The Department also proved that respondent did not maintain a policy against discrimination based on religion, nor a procedure either for considering religious accommodation requests or a grievance for denial of a request or claim of discrimination. Thus, respondent is liable for violation of Government Code section 12940, subdivision (k).

Remedy

Having established that respondent discriminated against complainant in violation of the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury he suffered as a result of such discrimination. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code §12970, subd. (a); Cal Code of Regs., tit. 2, §7286.9; (*Donald Schriver, Inc. v. Fair Employment & Housing Com.*(1986) 220 Cal.App.3d 396, 407.); *Dept. Fair Empl. & Hous. v. Madera County* (1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, p. 33-34.)

The Department's amended accusation sought back pay, out-of-pocket costs, an administrative fine, and affirmative relief.

A. Make-Whole Relief

1. Back Pay

Complainant would normally be entitled to receive back pay for the wages he otherwise could have been expected to earn but for respondent's discrimination. (*Donald Schriver, Inc. v. Fair Employment & Housing Com.*, *supra*, 220 Cal.App.3d at p. 407.) Here complainant obtained comparable employment simultaneous with his termination. Evidence at hearing also established that respondent paid complainant for the suspension period, albeit inadvertently, through July 19, 1997. Thus, complainant had no actual wage loss and, in its closing brief, the Department withdrew its prayer for back pay. Accordingly, no back pay is awarded.

2. Out of Pocket Damages

No evidence was presented establishing out of pocket damage and none will be awarded.

3. Compensatory Damages for Emotional Distress

The Department did not plead or seek an award of emotional distress damages. (Gov. Code, §12970, subd. (a)(3).) Thus, no such damages will be awarded.

B. Administrative Fine

On October 25, 2001, the Department filed a petition to amend the accusation to delete its prayer for an administrative fine. Respondent did not oppose the amendment. The Commission grants the Department's petition and accordingly, no administrative fine is ordered in this case.

C. Affirmative Relief

The Department asks that respondent be ordered to: implement policies and procedures, including for grievance, on religious creed discrimination for their employees; to modify its leave policy to comply with the Act; to implement religious creed discrimination training of all managerial and supervisory personnel; and to display postings, as forms of affirmative relief. The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code §12970, subd. (a)(5).)

Respondent will be ordered to cease and desist from unlawful discrimination and retaliation on the basis of religious creed. Respondent will be ordered to post a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B). Respondent will be ordered to develop and disseminate at Gemini Aluminum Corporation a policy on religious creed discrimination and reasonable accommodation. Respondent also will be ordered to provide training about religious creed discrimination and reasonable accommodation to all current Gemini Aluminum Corporation supervisory and management personnel.

ORDER

1. Respondent Gemini Aluminum Corporation shall immediately cease and desist from discriminating against religious creed, denying reasonable accommodation for religious creed and retaliating against employees for exercising their rights under the Fair Employment and Housing Act.

2. Within 60 days of the effective date of this decision, respondent Gemini Aluminum Corporation shall prepare and implement a written policy on religious creed discrimination and reasonable accommodation, and a complaint procedure for employees who allege religious creed discrimination, including the denial of accommodation for religious creed in the workplace. Further, respondent Gemini Aluminum Corporation shall provide training to its managers, supervisors and employees.

3. Within 60 days of the effective date of this decision, respondent Gemini Aluminum Corporation's managers and supervisors shall attend a training program about religious creed discrimination and reasonable accommodation, the duty of all employers and supervisors to prevent and eliminate religious creed discrimination and the procedures and remedies available under California law.

4. Within 10 days of the effective date of this decision Respondent Gemini Aluminum Corporation shall complete, sign and post clear and legible copies of the notices conforming to Attachments A and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

5. Within 100 days after the effective date of this decision, respondent Gemini Aluminum Corporation shall in writing notify the Department and the Commission of the nature of its compliance with sections two through four of this order.

The Commission designates the portion of this decision entitled Determination of Issues pages 7 through 12 as precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: January 10, 2002

GEORGE WOOLVERTON

LISA DUARTE

CATHERINE F. HALLINAN

JOSEPH JULIAN

ANNE RONCE

HERSCHEL ROSENTHAL

ATTACHMENT A

GEMINI ALUMINUM CORPORATION

NOTICE to EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION, an agency of
the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Gemini Aluminum Corporation violated the Fair Employment and Housing Act (Gov. Code, §12900 et seq.) by discriminating against an employee on the basis of his religious creed, by failing to provide reasonable accommodation for his religious creed, and by failing to take steps to prevent discrimination on the basis of religious beliefs.

As a result of the violation, the Commission has ordered the Gemini Aluminum Corporation to post this notice and to take the following actions:

1. Cease and desist from discriminating on the basis of religious creed, denying reasonable accommodation for religious creed, and retaliating against employees for exercising their rights under the Fair Employment and Housing Act.
2. Develop and implement a written policy on religious creed discrimination and reasonable accommodation and a complaint procedure for employees who allege discrimination against religion.
3. Send supervisors and managers to a training program about religious creed discrimination and reasonable accommodation.
4. Post this Notice for 90 days and permanently post a copy of Attachment B detailing employees rights regarding religious creed discrimination.

Dated: _____

By: _____
REPRESENTATIVE, GEMINI
ALUMINUM CORPORATION

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

GEMINI ALUMINUM CORPORATION

RELIGIOUS CREED DISCRIMINATION

YOUR RIGHTS AND REMEDIES under the CALIFORNIA FAIR EMPLOYMENT AND
HOUSING ACT

STATE LAW PROHIBITS RELIGIOUS CREED DISCRIMINATION IN EMPLOYMENT.

Discrimination against you because of your religious creed is unlawful. If, because of your religious creed, any employer fails to explore available reasonable alternatives for accommodating your religious belief or observance, or fails to provide reasonable accommodation that is not an undue hardship, retaliates against you, or otherwise discriminates against you in your terms and conditions of employment, that employer may have violated the Fair Employment and Housing Act.

IF YOU BELIEVE THAT YOU HAVE BEEN DISCRIMINATED AGAINST, YOU CAN
COMPLAIN AND GET RELIEF.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
investigates and prosecutes complaints of religious creed discrimination. If you think that
you have been discriminated against, you may file a complaint with the Department at:

Department of Fair Employment and Housing
611 West Sixth Street, Suite 1500
Los Angeles, CA 90017
(213) 439-6700 or (800) 884-1684

The Department will investigate your complaint and any defense your employer makes. If your complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department can prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the employer to stop discriminating, to give back pay and damages for emotional injury, and to take other appropriate actions. After you have filed a complaint with the Department, you may also choose to take your case to court with your own attorney.

DATED: _____

By: _____
REPRESENTATIVE, GEMINI
ALUMINUM CORPORATION

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE
CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL
REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE
ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY
WAY THAT HINDERS ITS VISIBILITY.